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11 UNITED STATES DISTRICT COURT  
12 FOR THE EASTERN DISTRICT OF WASHINGTON  
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14 JEREMY OLSEN,

15 Plaintiff,

16 v.

17 XAVIER BECERRA, in his official  
18 capacity as Secretary of the United States  
19 Department of Health and Human  
20 Services,

21 Defendant.

No. 2:21-CV-00326-SMJ

RESPONSE TO PLAINTIFF'S  
"NOTICE OF INCOMPLETE  
ADMINISTRATIVE RECORD"

22 Defendant Xavier Becerra, in his official capacity as Secretary of the United  
23 States Department of Health and Human Services, ("Defendant"), through counsel,  
24 submits the following response to Plaintiff's "Notice of Incomplete Administrative  
25 Record," filed on February 24, 2022 (ECF No. 19).

26 There are two claims for Medicare reimbursement at issue in this case: (1) an  
27 April 19 – July 18, 2019 claim; and (2) a March 10, 2021 claim. *See* ECF No. 1 at ¶¶  
28 63-90. Plaintiff's assertion that Defendant violated 42 U.S.C. § 405(g) by not filing  
an administrative record for the March 10, 2021 claim is incorrect. Section 405(g)

1 governs judicial review of “final decision[s]” by the Secretary. 42 U.S.C. § 405(g).  
2 There was no “final decision” within the meaning of § 405(g) as to the March 10,  
3 2021 claim because Plaintiff did not appeal the ALJ decision on that claim<sup>1</sup> to the  
4 Medicare Appeals Council (“Appeals Council”). *Compare* ECF No. 1 at ¶¶ 64-66  
5 (alleging timely appeal to Appeals Council of ALJ decision as to April 19 – July 18,  
6 2019 claim) *with* ECF No. 1 at ¶¶ 79-85 (no allegation of appeal to Appeals Council  
7 of ALJ decision as to March 10, 2021 claim). Because there was no “final decision”  
8 by the Secretary as to the March 10, 2021 claim, § 405(g) does not require the filing  
9 of an administrative record of the Secretary’s (non-final) decision on that claim.  
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13 Nonetheless, in the interest of moving this case to an efficient resolution,  
14 Defendant has agreed to prepare and file an administrative record for the March 10,  
15 2021 claim. The parties have agreed that the filing of an administrative record as to  
16 this claim will not result in a waiver of any arguments or defenses that Defendant may  
17 raise in connection with that claim.  
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20 <sup>1</sup> The March 10, 2021 claim was denied in error by the Medicare Administrative  
21 Contractor on April 16, 2021, seven weeks after this Court’s summary judgment  
22 ruling in *Olsen I* (but before the Court’s April 20, 2021 ruling that the Secretary had  
23 acted in bad faith). The contractor corrected its error and paid the claim on July 15,  
24 2021—five months before the ALJ decision was issued on October 30, 2021, and six  
25 months before this lawsuit was filed on November 18, 2021.  
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1 All five documents referenced in Plaintiff's filing (ECF No. 19 at 2) have been  
2 provided to Plaintiff pending completion of the administrative record for the March  
3 10, 2021 claim. Defendant has no objection to those documents (or other documents  
4 relating to the March 10, 2021 claim) being submitted via declaration if Plaintiff  
5 wishes to move for summary judgment before the administrative record for the March  
6 10, 2021 claim is filed.  
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8  
9 DATED this 28th day of February, 2022.

10 Vanessa R. Waldref  
11 United States Attorney

12 s/John T. Drake  
13 Brian M. Donovan  
14 John T. Drake  
15 Assistant United States Attorneys  
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 28, 2022, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

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s/John T. Drake  
John T. Drake